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IN THE

Supreme Court of the United States

October Term, 1967

No. 997

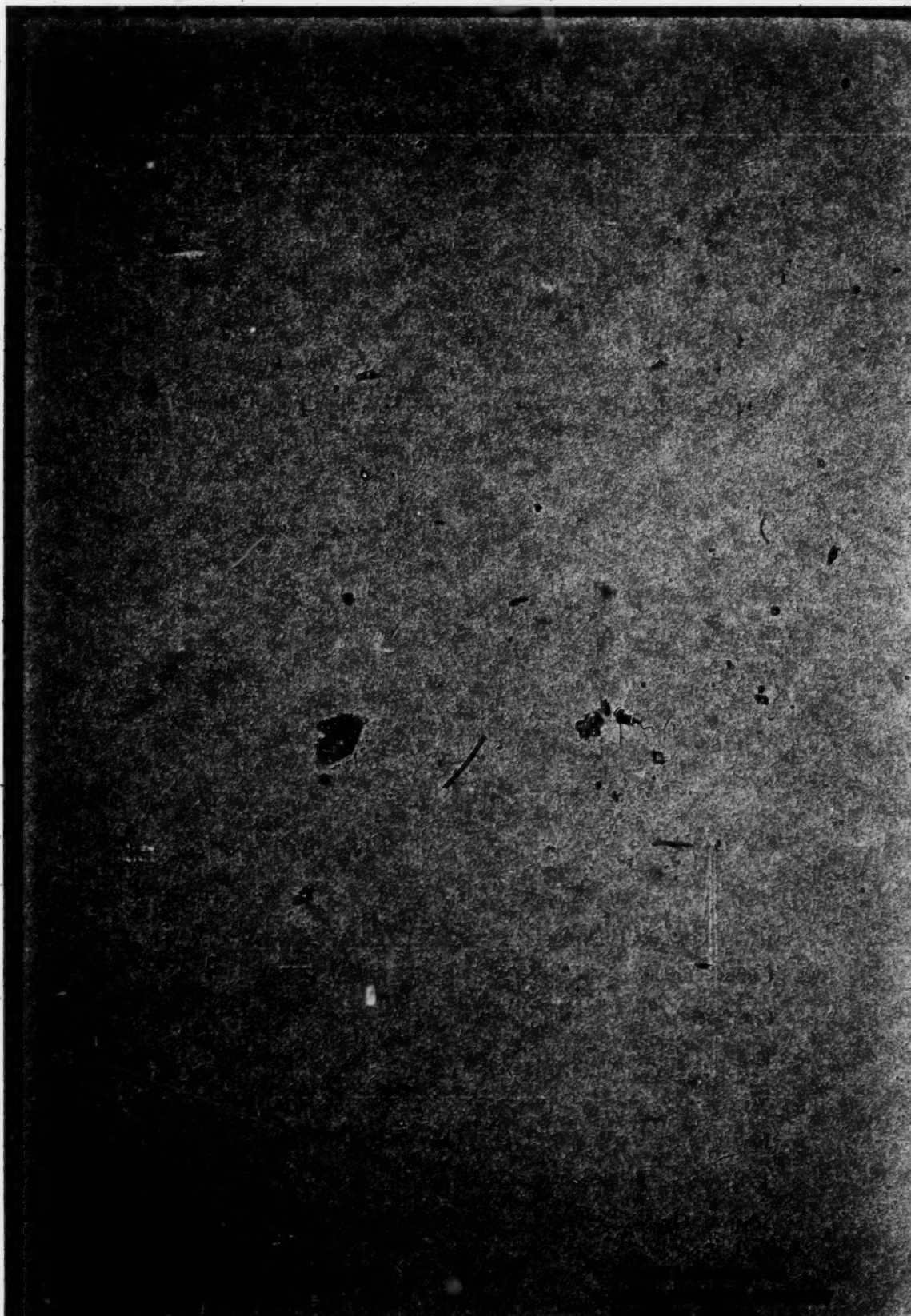
LEE ART THEATRE, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

REPLY BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia
City Hall, Room 103
Richmond, Virginia 23219
Counsel for Respondent



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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits that the petition for a writ of certiorari to the judgment of the Supreme Court of Appeals of Virginia in the above entitled case entered on the 10th day of October 1967, should be denied.

The questions raised by the petitioner will be answered in the same order that the petitioner has them numbered and, for the sake of clarity, the parties will be referred to as they appeared in the trial court. Since this Court has

raised an issue not presented by the petitioner, it will be necessary to elaborate on the facts of the instant case in some detail. (See letter of March 5, 1968, from E. P. Cullinan, Deputy Clerk, to the Honorable Robert Y. Button.)

STATEMENT OF FACTS

The prosecution involved in this case was initiated by the Richmond Bureau of Police on the 21st day of March, 1966, after the officers viewed the film, "Erotic Touch of Hot Skin," the previews of "Rent-A-Girl," and "fliers" at the Theatre, designated as Lee Art Theatre, Inc. The first mentioned film was personally observed by the police officers and, pursuant to their observation, a search warrant was obtained by the police. Pursuant to this search warrant, the film, the "Erotic Touch of Hot Skin," the previews of "Rent-A-Girl" and the movie, "Rent-A-Girl," were seized. The "D-Girls," which the officers had observed on previous occasions, was also seized at the Theatre. The search warrant only listed "Erotic Touch of Hot Skin" and the previews of "Rent-A-Girl," however, the officers had also observed the other movies, except the film entitled "Rent-A-Girl."

This case originated due to the kind of advertisement given by the Lee Art Theatre, Inc., to the motion pictures being shown at the said Theatre. These advertisements consisted of "fliers" on the front of the Theatre and also in the local newspapers. The "fliers" and advertisements in the papers displayed nude women with sexual organs blotted out, and also both male and female in suggestive positions.

The officers observed the movie, "Dirty Girls," on Saturday, and were preparing to seize this movie on the following Monday, but the Theatre changed pictures on that Monday. After this change of events, it was necessary for

the officers to observe the motion picture, "Erotic Touch of Hot Skin." After observing this motion picture and the previews of "Rent-A-Girl," they obtained a search warrant to gain admittance to the projection room of the Theatre. It can be noted by "Appendix C" in the defendant's brief that two of the movies seized were designated in the affidavit for the search warrant and search warrant. The probable cause consisted of personal observation by the officers of the subject movies so seized. After the officers were lawfully in the projection room under the search warrant, they did seize other movies which they had observed on prior occasions, except for "Rent-A-Girl."

Originally, the manager and assistant manager of the Theatre were charged under the applicable Virginia statute. They were offered by the Commonwealth's Attorney, with the Court's agreement, a trial within seven days after their arrest to determine if the motion pictures, "Erotic Touch of Hot Skin," and "Rent-A-Girl," were obscene or not. This was done so that the defendants could receive a speedy trial on the question of obscenity of the motion pictures and so that the business of the Theatre would not be unduly burdened, should it be determined that the motion pictures so seized were protected under the First Amendment to the United States Constitution. The defendants requested that a trial date be set off at some distant date and stated that they did not wish to have an immediate hearing on the question of whether or not the movies were obscene.

On May 19, 1966, the original defendant, Lunsford Lancelot Duke, filed in the United States District Court of the Eastern District of Virginia, Richmond Division, a petition for removal of the prosecution to the Federal Court. In reply to this, the Commonwealth made a motion

to remand. The Honorable John D. Butzner, the then District Judge, remanded the case to the State Court on May 26, 1966. The defendant then indicated his intention to appeal the District Judge's ruling to the United States Court of Appeals for the Fourth Circuit. This appeal was abandoned and, on September 16, 1966, an order was entered, dismissing the said appeal under Rule 23 of the United States Court of Appeals for the Fourth Circuit.

The cases then came back to the Hustings Court of the City of Richmond and, after conferences and negotiations by the then counsel for the Lee Art Theatre, Inc., and Lunsford Lancelot Duke, it was agreed that the manager and assistant manager would be dismissed from prosecution, that the Corporation, Lee Art Theatre, Inc., would be made a defendant instead and that the cases would subsequently be tried to determine wheher or not the motion pictures in question were obscene or not.

Pursuant to this agreement of counsel, the defendant Corporation was tried and all matters of fact and law were presented to a jury which was under proper instruction from the Court. The jury then returned a verdict of guilty and set the punishment and a fine of $500.00. In Virginia, the jury also sets the punishment for any one convicted of a crime.

Under the facts and law, the trial court found the jury verdict correct and, accordingly, entered judgment against the defendant Corporation. The defendant noted its appeal to the Supreme Court of Appeals of Virginia which, on the 10th day of October, 1967, refused a writ of error and supersedeas to the judgment of the Hustings Court of the City of Richmond. After this, the petitioner filed a petition for a writ of certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

The Affidavit Set Out Enough Facts To Establish Probable Cause For The Issuance Of A Search Warrant.

It would appear that no better probable cause could be established than the personal observation of a police officer who is making the affidavit. The affidavit was concise and set forth exactly what the officer was looking for by the names of the motion picture and previews. He also stated that his observation of the billboard in front of the Theatre assisted him in determining the motion pictures were obscene. That is to say, that this Theatre was "pandering" sex.

The Fourth Amendment provides that:

> "* * * No warrant shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched and the persons or things to be seized."

It is respectfully submitted that the affidavit and search warrant in this case complied with that mandate as the place to be searched and the things to be seized were adequately described in every particular.

II.

The Fourth Amendment To The Constitution Does Not Demand That The Affidavit And Search Warrant Should Have The Time That The Offense Occurred And When The Observations Were Made By The Officers.

This question must be answered in the negative, as the Virginia law does not require that the time of the observations or offense be placed in the affidavit for a search warrant. The Virginia statute sets forth what the affidavit

must contain prior to issuance of a search warrant as follows:

> "Section 19.1-85. No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made. Such affidavit shall be certified by the officer who issues such warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued."

Nowhere in the statute does it say that the time must be put in the warrant. In *Ker* v. *California,* 374 U.S. 23, this Court held that there was no set rule that the states must follow in determining the reasonableness of the search, so long as the search was not prohibited by the Fourth Amendment to the Constitution. In *Ker,* the following is stated by the Court:

> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts

and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, *e.g., Spano* v. *New York,* 360 U.S. 315, 316 (1959); *Thomas* v. *Arizona,* 356 U.S. 390, 393 (1958); *Pierre* v. *Louisiana,* 306 U.S. 354, 358 (1939). While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.,* constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones* v. *United States,* 362 U.S. 257 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

III.

Title 18.1-227 Of The Code Of Virginia, 1950, As Amended Is A Proper Definition Of Obscenity.

It is respectfully submitted that the definition of obscenity as defined in the Virginia Code is derived from *Roth* v. *United States,* 354 U.S. 476 (1957). This definition states that the article must be considered as a whole and must have as its dominant theme or purpose an appeal to the prurient interest; that is, a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond the customary limits of candor in describing or representing such matter.

The instructions given the jury set out these points and also the question as to whether there was any redeeming social value in the movies. The jury found as a fact and beyond a reasonable doubt, that there was no redeeming social value in the movies. The instruction given to the jury as to the obscenity issue is as follows:

> "The Court instructs the jury that the test to determine obscenity is as follows: Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> The Court further instructs the jury that under this definition three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
>
> And the Court further instructs the jury that unless you believe from the evidence that the Commonwealth has established beyond a reasonable doubt that the

> motion picture involved in this case is obscene under the above definition, then the jury must find the defendant, Lee Art Theatre, Inc., not guilty."

As to the question of obscenity, the jury would be in a much better position to determine this question than would any other group or panel. The jury was composed of a cross-section of the community. Their minds were not biased and certainly they were, and are, protectors of the First Amendment freedom. Their objectivity would be fairer than that of lawyers and judges, as they should have the right to determine the moral values in the society in which they live and raise their children. This jury found beyond a reasonable doubt that the motion pictures were obscene and it is respectfully submitted that a jury verdict found on facts and proper law should not be disturbed by courts, unless clearly wrong.

The framers of the Constitution and the people of this nation, feeling and enjoying freedom, have, in the Constitution, protected the right of trial by jury. This right is guaranteed to both the defendant and to the government. The Seventh Amendment, which deals with civil cases, clearly states:

> "No fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law."

It is submitted that the defendant is now asking this Court to sit as a jury in the instant case. Trial by jury is a most sacred right and under our republican form of government give the people an opportunity to speak under law.

The defendant has not pointed out any error in the instructions and has not argued strongly that the motion pictures in question were not obscene. Anyone viewing the

motion pictures could not have come to the conclusion that they were not obscene. Obscene material is not protected by the First Amendment. *Roth* v. *U. S., supra.*

The defendant was pandering sex by the advertisements on the front of the Theatre. In *Ginzburg* v. *U.S.*, 383 U.S. 463, this Court stated:

> "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test."

The Court in *Ginzburg, supra,* further defines obscenity when it stated with approval the following:

> "Petitioners' own expert agreed, correctly we think, that '(i)f the object (of a work) is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic."

Clearly, the motion pictures in question violate and do violence to every rule of decency and morality known in this nation and are utterly without any redeeming social value. The Theatre and movies were selling sex for the sole purpose of profit to the exhibitor.

IV.

Marcus, Et Al. v. Search Warrant Of Property, 367 U.S. 717, Does Not Apply To The Instant Case.

The defendant has never raised this issue in any of his arguments, briefs, or negotiations in this case. The point was not raised in the Hustings Court of the City of Rich-

mond, the Supreme Court of Appeals of Virginia nor the brief for a petition for a writ of certiorari, but apparently the Court, on its own motion, raises the *Marcus* case. It seems to be well settled that if the question is not raised in the State Court, the Supreme Court of the United States will not take jurisdiction of the matter. *Cox* v. *Texas*, 26 S. Ct. 671; *McGoldrick* v. *Compagnie Generale Transallantique*, 60 S. Ct. 670; *Pennsylvania Railroad Company* v. *Illinois Brick Co.*, 56 S. Ct. 556; *Bothwell* v. *Buckbee-Mears Co.*, 48 S. Ct. 124, 275 S. Ct. 274.

However, it is respectfully submitted that the *Marcus* case is not even in point with the present case. The search involved in this case certainly was not a general search. The officers listed in the affidavit, the movies, and previews that were obscene, which they seized. The police officers' judgment as to the movies being obscene was affirmed by a committee of citizens a few days after the seizure. This group had not been sanctioned by the Court, but was called together by the Attorney for the Commonwealth to see if they felt the movies were obscene. Further, the jury which tried the case found the movies to be obscene.

The Court, in the first instance, expressed its desire to have the case heard immediately after the seizure to determine whether or not the films were obscene. The defendant was the cause of the delay in having the matter immediately adjudicated, not the Commonwealth. The prosecuting attorney insisted on an early date because he was aware of the rulings of this Court relative to obscene publications. There was no undue delay created or caused by the prosecution, in giving the defendant its day in Court.

In the *Marcus* case, it is stated that 180 of the publications seized under the search warrant were found not to be obscene, and the fact that only one-third of the publications so seized were finally condemned strengthens the conclusion

that discretion to seize allegedly obscene materials cannot be confined to law enforcement officials without greater safeguards. The finding in this case supported the police officer in his determination that the movies were obscene. There was a conviction on both motion pictures so seized in the instant case. If the Court is going to use the language in Marcus to show whether it is a general search or not in favor of the defendant, it would be only fair that the Court use the converse position in finding the subject matter obscene.

Furthermore, the Fourth Amendment to the United States Constitution only forbids unreasonable search and seizure. In this case, there has been no showing that the search and seizure was unreasonable, but to the contrary, very reasonable. The officers paid their way into the Theatre the first time, observing the motion pictures, and had a right to make an arrest at that particular time, but they went instead to get a search warrant. The officers were lawfully there and the movies which they seized were properly seized. The officers did not indiscriminately take any and all films on the premises, but only those of which they had personal knowledge.

It is respectfully submitted that this case is not in point with the facts in the instant prosecution.

V.

Request To Clarify Law

It is widely held that the law of obscenity is now in a state of confusion. Police, prosecutors and defense attorneys cannot positively determine whether or not a certain material is obscene. On one hand, the public is demanding a sense of morality and decency in the nation while, on the other hand, cases are being reversed on a technical ground or because

the material is believed to be protected under the guarantee of the First Amendment to the Constitution.

This leaves the nation in a state of confusion as to this important aspect of the law. A simple problem is made complex. Every one can recognize obscenity when they see it. If the law be that any and all publications and works are to be protected under the Constitution, then the Court should so state in plain and unequivocal language, thereby giving the states and their people the right to exercise their privilege under Article 5 of the Constitution. If the people of the nation are satisfied with the Court's ruling, then no more need be said, but if they are aggrieved, then certainly they would have a right and duty to amend the Constitution, outlawing obscenity.

Fair play requests and justice demands that the Court clear up, once and for all, the ambiguity in our law, in order that the citizens, police and prosecutors may know where they stand.

CONCLUSION

It is obvious from casual observation that obscene material is infiltrating the moral fiber of the nation to such an extent as to strike at the very walls and foundation upon which this nation is built. Crime increases at the rate of almost nine times the growth of our population. The situation has become so acute that the Honorable J. Edgar Hoover, Director of the Bureau of Investigations, made the following statement:

> "Police officials who have discussed this critical problem with me unequivocally state that lewd and obscene material plays a motivating role in sexual violence. In case after case, the sex criminal has on his person or in his possession pornographic literature or pictures. Under these conditions, it is not surprising

to note that forcible rape in 1966 increased 10 percent over the 1965 total, a violation occurring every 21 minutes. Since 1960, forcible rape has increased 50 percent.

Obviously, all that is being done to combat the sale and traffic in obscene material in the Nation is not enough. Sound and workable laws are needed, and, where they do exist, they should be vigorously enforced. Since many courts seem to judge obscenity on the basis of the moral standards in the community, the public has a vital role in upgrading the level of community morality. When obscene material is discovered, it should be exposed and citizens should complain to proper authorities. When pornography is received in the mails, postal authorities should be advised. Citizens should come forward and cooperate in the prosecution of offenders.

Obscene material is indeed evil, but it is not a necessary evil. If the illicit profits in pornography were replaced with stiff punishments for the filth purveyors, this evil would be brought under control."

The facts of this case clearly and beyond a reasonable doubt show that the defendant corporation had a fair and impartial trial based on the law of the land and no person could ask for more. By obscenity not being protected either by the State or Federal Constitution, it is clear that the defendant is guilty of violating a valid criminal law of the Commonwealth of Virginia.

The question in the instant case is whether the judicial branch of government which has been charged with the responsibility of protecting the public morals will delegate this responsibility to irresponsible purveyors of hard core pornography. It is respectfully submitted that the esteemed judiciary of this country is not ready or willing to allow this to happen.

Obscenity plays such a major part and cause of crime and lawlessness found in our present-day society it should be suppressed.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia
City Hall, Room 103
Richmond, Virginia 23219
Counsel for Respondent